plaintiff may get damages for the breach of an affirmative agreement he must have also a right to specific performance, subject only to the ordinary limitations of equity in enforcing contracts which require affirmative acts on the part of the defendant. Thus a covenant to build and repair a fence has been enforced specifically against a grantee of the covenantor on the ground that he was liable at law.[4] In these cases equity has concurrent jurisdiction, and they can accordingly be distinguished from the English cases, for while under the English view notice or absence of value is essential to charge the defendant, here neither is of importance because he is already charged at law.[5] Of course wherever the covenant is such that it can run only in equity the rules of the English courts in regard to notice and value would apply. But it is doubtful whether even in such cases the American courts will confine themselves to the enforcement of restrictive agreements only. The basis of enforcing such agreements at all against the assignee must be that as he took the premises with full notice of the covenant, he probably paid less for them than would otherwise have been the case, and if he were now allowed to escape the obligation, he would be unjustly benefited at the expense of the covenantee.[6] It is hard to see why this argument does not equally apply to the enforcement of affirmative as well as negative covenants. It may be said that in the case of an affirmative covenant the promisee still has his remedy against the original promisor; but it is at least doubtful whether the same be not true of a restrictive agreement.[7] A more probable explanation of the English rule is to be found in the hesitation which courts of equity for a long time felt in compelling a defendant to do affirmative acts in the performance of a contract. If the English rule can be regarded as arising from this erroneous notion of the power of a court of equity, and not as resulting from any peculiar circumstances surrounding these covenants, there would seem to be no reason for adopting it in this country.[8]

THE REQUIREMENT OF ACTUAL NOTICE TO NON-RESIDENT DEFENDANTS IN DIVORCE PROCEEDINGS. — Although it seems highly desirable that uniform rules concerning the extra-territorial validity of divorce decrees should be applied in the various states, there exists in that branch of American law no little confusion, due to the conflicting conceptions which the different courts have held as to the real nature of divorce proceedings. The view formerly held in New York and a few other states that such proceedings are proceedings *in personam* requiring personal service within the state in order to affect the status of the defendant has been rendered untenable by a decision of the Supreme Court of the United States.[1] The New Jersey doctrine, which has found considerable support in the courts of other states and among the text-writers,[2] apparently recognizes that the proceedings are not strictly *in personam*, but assumes that they partake to some extent of that character. Consequently, as is shown by a recent case, it is

[4] Countryman *v.* Deck, 13 Abb. New Cas. 110.
[5] *Ibid.*
[6] 17 HARV. L. REV. 176.
[7] *In re* Poole & Clarke's Contract, [1904] 2 Ch. 173.
[8] Bald Eagle, etc., R. Co. *v.* Nittany, etc., R. Co., 171 Pa. St. 284. See Lydick *v.* B. & O. R. R. Co., 17 W. Va. 428.

[1] Atherton *v.* Atherton, 181 U. S. 155.
[2] Minor, Conflict of Laws § 94.

held that although the courts of the plaintiff's domicile have jurisdiction of that party's status as of a *res*, the fact that the other party's status is necessarily concerned renders the proceeding a proceeding *in personam* to the extent of making actual notice of the pendency of the suit a necessity when such notice is possible. *Davenport* v. *Davenport*, 58 Atl. Rep. 535 (N. J. Ch.). Although it is difficult to support this rule as a requirement for jurisdiction, a distinction certainly exists between divorce proceedings and other proceedings *in rem*, and on grounds of public policy such a requirement by legislation in each state might seem desirable.

In the absence of any such legislation, however, the theory which seems based on the soundest reasoning makes no requirement of personal notice to the non-resident. Jurisdiction of the status of one of the parties is the only essential. It must be obvious that every sovereignty has power to determine the status of its own citizens, and that this power cannot be altered by the fact that the nature of the marriage relation is such that it is terminated by changing the status of one of the parties. In other words, divorce proceedings, in so far as they affect the status of the domiciled citizen, are proceedings *in rem*,[3] and all that is necessary to give them validity is that they shall not be taken without due process of law. With this qualification, as in the case of other actions *in rem*, the laws regulating the procedure and providing for substituted service may vary in the different states; and in every case in which the plaintiff was actually domiciled in the state rendering the decree, the courts of other states, it is submitted, should inquire only whether the provisions of the local law for substituted service have been fully complied with. This view, which is supported by the authority[4] of some decisions and of some text-writers, seems likely to prevail with the Supreme Court of the United States; for in some very weighty *dicta*[5] that tribunal has declared in effect that each state has power to prescribe the conditions on which divorce proceedings may be commenced and carried on within its territory.

DOUBLE JEOPARDY. — The Supreme Court of the United States has recently enforced the rule that one trial, save in certain exceptional cases, constitutes one jeopardy, and that a defendant, after a trial in one court, is protected by constitutional or common law prohibitions of double jeopardy, from being again tried for the same offense. *Kepner* v. *United States*, 24 Sup. Ct. Rep. 797. Mr. Justice Holmes, dissenting, contends that, within the meaning of the Constitution, there is but one jeopardy in one entire cause as carried through to its termination in a court of last resort. This interpretation, forbidding only a trial on a new and independent indictment for an offense for which the defendant has already been tried, enables an appeal at the instance of either party. Arguing that in regard to an appeal the rights of the prosecution and of the prisoner should be identical, he declares insupportable the theory of waiver, which justifies an appeal by the prisoner only. He believes a man cannot waive so fundamental a constitutional right as the protection against double jeopardy.

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[3] *In re* Newman, 75 Cal. 213.

[4] Thompson *v.* State, 28 Ala. 12.

[5] See Pennoyer *v.* Neff, 95 U. S. 714; Cheely *v.* Clayton, 110 U. S. 701; Cool., Const. Lim., 6th ed., 499; 2 Bishop, Marriage, Divorce, and Separation § 152.